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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN DI GILIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government must prove beyond a reasonable doubt that petitioner is competent to stand trial and to be sentenced.

2. Whether the evidence was sufficient to support the district court's finding that petitioner was competent to be resentenced.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. C) is reported at 538 F. 2d 972. The order of the court of appeals (Pet. App. J) following remand to the district court is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. J) was entered on July 15, 1980. A petition for rehearing (Pet. App. K) was denied on August 6, 1980. The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of New Jersey for conspiracy to defraud the United States (18 U.S.C. 371) and conversion of photocopies of official FBI files (18 U.S.C. 641). Prior to trial, petitioner moved pursuant to 18 U.S.C. 4244 for a determination of his competency to stand trial. The district court directed petitioner to report to a clinic to be examined as to his competency. Following petitioner's examination by several doctors, the district court held an extensive hearing on the competency question.

1. The evidence at the pretrial hearing showed that petitioner had been a professional boxer during the 1950's, and that he had suffered a series of knockouts. The evidence further showed that petitioner had suffered blows to the head during a tugboat accident, an auto accident, and a fall while in custody (Pet. App. 8a-9a, 18a). Two factual issues predominated at the competency hearing: (1) the extent to which petitioner's mental processes were affected by any organic brain damage that might have resulted from his various head injuries; and (2) whether petitioner had malingered or purposely misled the medical witnesses as to his true abilities during his clinical observation period.

The district court found that petitioner functioned in the low normal range of intelligence, and that his somewhat lower test scores were due to his failure to make a bona fide attempt to do well when tested (Pet. App. 16a-17a). The court observed that petitioner had lived alone, or perhaps with one other person, in a New York apartment until the recent past, and that he had been able to manage his own affairs (Pet. App. 18a). The court further noted that none of petitioner's electroencephalograms showed any diffuse or focal brain abnormality (Pet. App. 19a). The court concluded that petitioner had some organic brain disorders,[1] but that his functioning at a mildly retarded level was to a certain extent simulated (Pet. App. 20a). Applying the competency test enunciated in *Dusky* v. *United States*, 362 U.S. 402 (1960), the court found that petitioner was able to consult with his lawyer, and that petitioner had a rational and factual understanding of the proceedings against him (Pet. App. 8a, 24a).

2. Petitioner was thereafter tried by a jury. He was convicted on both counts and sentenced to nine years' imprisonment. The trial evidence showed that petitioner had been the subject of an FBI investigation concerning loansharking and extortion between 1970 and 1972, and that he had procured the unauthorized copying of FBI documents relating to that investigation. The documents were photocopied by Irene Klimansky, an FBI clerk-typist, who delivered the copies to her fiance, George Kuczynski. He then delivered the copies to petitioner through certain intermediaries. Over the course of the several months in which these transactions occurred, Kuczynski was paid more than $1,000 for the documents (Pet. App. 29a-30a). At trial,

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[1]The court noted, however, that the medical records "very clearly" showed that "Mr. DiGilio's symptoms of organic brain disease are almost entirely subjective" (Pet. App. 19a).

petitioner never challenged his competency to commit the crime. Petitioner contended, however, that he was not receiving a fair trial, claiming that the court had changed juries during the trial (Pet. 8).

On direct appeal, the court of appeals held that the government must prove competency by a preponderance of the evidence, and that the district court had erred by placing the burden upon petitioner (Pet. App. 31a-38a). Thus, the case was remanded to the district court for a new competency determination and, if necessary, for the taking of further evidence on that issue (Pet. App. 38a-39a). The court of appeals further held that petitioner would have to be resentenced on the substantive count in any event because the trial evidence was insufficient to prove that the purloined records had a value in excess of $100, and petitioner should therefore have been sentenced under the misdemeanor rather than the felony provision of 18 U.S.C. 641 (Pet. App. 39a-40a).

3. On remand, the district court reviewed the record of the pretrial competency hearing and held that the government had proved petitioner's competency to stand trial by a preponderance of the evidence (Pet. App. 43a-56a). The court specifically found that petitioner's statements during trial concerning the changing of juries "was another attempt on his part to avoid trial by simulation of mental illness" (Pet. App. 54a).

Petitioner then challenged his competency for resentencing purposes. After a lengthy evidentiary hearing, the court again held that the government had proved petitioner's competency by a preponderance of the evidence. Petitioner based his incompetency claim on the presence of an organic brain condition that had allegedly worsened since trial. Specifically, petitioner claimed that the head injuries he had suffered as a boxer had resulted in a blood vessel abnormality known as an angioma. Petitioner's chief witness, Dr. Rosner, testified that stress may cause the engorgement of

blood vessels at the site of the angioma, which may induce an epileptic seizure. Dr. Rosner further testified, however, that petitioner would return to normal when the engorgement subsided (Pet. App. 62a-63a). The court credited the testimony of other medical specialists who found no angioma through a brain scan and who further testified that, if petitioner did have a brain lesion, it was on the nondominant side (Pet. App. 66a-71a). The court found petitioner to be competent on the ground that petitioner was "able to confer with his counsel in such a way that he can understand that a sentencing proceeding involves the concept of punishment" (Pet. App. 72a-73a). The court then resentenced petitioner to nine months' imprisonment. The court of appeals affirmed (Pet. App. 89a-92a).

ARGUMENT

1a. Petitioner's contention (Pet. 17) that competency to stand trial or to be sentenced must be proved beyond a reasonable doubt is without merit. It is well settled, of course, that the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime charged." *Mullaney* v. *Wilbur*, 421 U.S. 684, 685 (1975). Accord, *In re Winship*, 397 U.S. 358 (1970). Competency to stand trial or to be sentenced, however, is not an element of the offense. Unlike the defense of insanity, competency does not relate to the defendant's mental state or intellectual capacity at the time of the offense.[2] Competency relates only to the defendant's condition at the time of trial, long

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[2]While the prosecution bears the burden of establishing a defendant's sanity in a federal prosecution (see *Davis* v. *United States*, 160 U.S. 469 (1895)), the Constitution permits the burden of proof on the issue of sanity to be placed on the defense. See *Leland* v. *Oregon*, 343 U.S. 790 (1952); *Rivera* v. *Delaware*, appeal dismissed for want of a substantial federal question, 429 U.S. 877 (1976).

after the crime has been completed. The question of competency is therefore wholly collateral to the question of guilt. The result of a competency determination is that the defendant must stand trial; the determination does not, in and of itself, bring about a loss of liberty. Compare *Addington* v. *Texas*, 441 U.S. 418 (1979).

Although a defendant's competency to assist in his defense may affect the outcome of the trial, it is well settled that the government is not required to prove beyond a reasonable doubt the facts underlying all collateral matters that may ultimately affect the verdict. For example, the voluntariness of a confession need only be proved by a preponderance of the evidence. See *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). Likewise, the defendant must bear the burden of proving a violation of his Fourth Amendment rights before he will be entitled to the suppression of the fruits of an illegal search or seizure. *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980) slip op. 6.[3] Due process requires that a defendant not be tried unless he is proved to be competent (*Drope* v. *Missouri*, 420 U.S. 162 (1975); *Dusky* v. *United States*, 362 U.S. 402 (1960)), but that requirement will be satisfied if the government proves competency by a preponderance of the evidence, as it did here. See *United States* v. *Hollis*, 569 F. 2d 199, 204 (3d Cir. 1977); United States v. Makris, 535 F.2d 899, 906-907 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977).

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[3]Petitioner's reliance (Pet. 19-20) on *Chapman* v. *California*, 386 U.S. 18 (1967), is misplaced. In *Chapman*, the Court held that a conviction must be vacated when it has been established that the trial was infected by constitutional error, unless the government proves beyond a reasonable doubt that the error did not taint the verdict. *Chapman* does not hold that the government must prove beyond a reasonable doubt that the trial was free of constitutional error. In some circumstances, as *Rawlings* shows, the defendant bears the burden of establishing a constitutional violation.

b. Petitioner suggests, alternatively, that competency should be proved by at least "clear and convincing" evidence. In making this claim, he relies on *Addington* v. *Texas*, *supra*, which held that an individual may not be committed involuntarily to a state mental institution unless that standard of proof has been met. There is a fundamental difference, however, between a civil involuntary commitment proceeding and a criminal competency hearing. While the purpose of the former is to determine whether an individual should be deprived of his liberty, the purpose of the latter is to determine only whether a criminal defendant must stand trial. The criminal defendant will not lose his liberty unless his guilt is subsequently proved beyond a reasonable doubt. Because a defendant's liberty is not directly at stake in a competency hearing, the preponderance of the evidence standard suffices to insure that only those defendants who can understand the nature of the proceedings and assist in their defense will be tried.

Petitioner cites no case suggesting that any other court of appeals disagrees with the standard applied in his case. There is accordingly no reason for further review of the issue.

2. Petitioner mischaracterizes (Pet. 12-17) the district court's finding by contending that the court erroneously based its determination that he was competent to be resentenced on his failure to prove the physiological cause of his incompetence. Petitioner's chief witness, Dr. Rosner, testified that petitioner could not withstand the trauma of a resentencing hearing because he suffered from an angioma that becomes engorged during times of stress, which might cause petitioner to have an epileptic seizure. Dr. Rosner also testified that petitioner would return to normal when the engorgement ceased (Pet. App. 63a). The remaining witnesses testified that petitioner did not suffer from an

angioma. The court thus discredited Dr. Rosner's testimony (Pet. App. 66a-71a).

The court had already determined that petitioner was competent to be tried, a finding that is not challenged here. The district court observed petitioner during the trial, the initial sentencing hearing, and the lengthy resentencing-competency hearing. Based on all the evidence, the court concluded, "I am convinced that the [petitioner] is able to confer with his counsel in such a way that he can understand that a sentencing proceeding involves the concept of punishment" (Pet. App. 72a-73a). The court thus found petitioner competent to be resentenced (Pet. App. 71a-73a). This factual determination, in which the court of appeals concurred, does not warrant further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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